

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JANICE ZAREMBA,)
)
) C.A. No. 04A-03-009 (CHT)
 Employee-Appellant,)
)
 v.)
)
 GENERAL MOTORS CORP.,)
)
 Employer-Appellee.)

ORDER REGARDING APPELLANT'S APPEAL FROM THE
INDUSTRIAL ACCIDENT BOARD

_____This 26th day of August 2005, after reviewing the record and arguments of the parties, it appears to the Court that:

1. On January 18, 1996, the Employee-Appellant, Ms. Janice Zarembo, was injured during the course of her employment with General Motors ("GM"). In March 2003, by means of an agreement between the parties, Ms. Zarembo began receiving partial disability payments in the amount of \$372.23 per month.¹ GM filed a Petition for Review, on October 16, 2003, claiming that Ms. Zarembo's benefits should be reduced

¹ This payment amount was based on Ms. Zarembo's weekly wage at GM of \$778.80.

based on a recent labor market survey.

2. A hearing was held on February 17, 2004 and deposition testimony from Dr. Arthur Baitch was admitted to prove that Ms. Zaremba was capable of full-time sedentary or light duty work. Based on Dr. Baitch's testimony, Ms. Rene Beth Gleckner, a vocational rehabilitation specialist, conducted a labor market survey. Working under the belief that Ms. Zaremba was employable, Ms. Gleckner found Ms. Zaremba ten suitable jobs with an average salary of \$362.39 per week. Ms. Gleckner admitted that she did not know what the weekly salaries of the proposed jobs would have been in 1996 or 1997.

3. Ms. Zaremba offered testimony that she had not worked since 1997 and does not feel that she is able to re-enter the work force at this time.² She told the Board that the current pay for her position is \$26.00 per hour and that she learned this information from a union representative.

4. On March 2, 2004, the Board issued its opinion holding that based on the labor market survey and testimony of Dr. Baitch, GM had met its burden to support a decrease in Ms. Zaremba's partial disability benefits. It declared that Ms.

² Ms. Zaremba points to various problems with her knees and back but admits that these problems did not result from her work place injuries.

Zaremba had sustained a loss of earning capacity totaling \$416.41 and now her disability payment would be reduced to \$227.60 per week. Ms. Zaremba filed a timely appeal of the Board's decision to this Court.

5. First, Ms. Zaremba argues that her "economic condition" has not changed and consequently the decrease in her benefits would be improper. Second and alternatively, she alleges the computation of the loss of earning capacity determined by the Board was incorrect. Ms. Zaremba cites *Maxey v. Major Mechanical Contractors*³, insisting "earnings after the injury must be corrected to correspond with the general wage level in force at the time pre-injury earnings were calculated."⁴ Thus, Ms. Zaremba claims that the Board should have adjusted the hypothetical average weekly wage of possible jobs for Ms. Zaremba to reflect actual wages in 1996. GM contends that according to the Labor Market Survey, Ms. Zaremba's economic condition has in fact changed and furthermore, GM maintains that under *Maxey*, it was the appellant's burden to introduce evidence of the wage differential.

³ 330 A.2d 156 (Del. Super. Ct. 1974).

⁴ *Id.* at 158.

6. The Court is bound by the Board's findings if they are supported by substantial evidence and absent abuse of discretion or error of law.⁵ "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁶ It "is more than a scintilla and less than a preponderance" of the evidence.⁷ This Court does not weigh the evidence, determine questions of credibility or make its own findings of fact.⁸ This Court's function is to determine if the evidence is legally adequate to support the factual findings below.⁹ The Court's review of alleged errors of law is plenary.¹⁰ A review of the Board's decision in light of these standards requires this Court to affirm the same.

7. The Court finds the Board did not err in granting GM's request for a reduction of Ms. Zaremba's benefits. Partial disability benefits are distributed to "assure that a

⁵ *Ohrt v. Kentmere Home*, 1996 WL 527213, at *3 (Del. Super.).

⁶ *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *Streett v. State*, 669 A.2d 9, 11 (Del. 1995).

⁷ *City of Wilmington v. Clark*, 1991 WL 53441, at *2. (Del. Super.).

⁸ *Johnson v. Chrysler*, 213 A.2d 64, 66 (Del. 1965).

⁹ 29 Del. C. §10142(d).

¹⁰ *Brooks v. Johnson*, 560 A.2d 1001 (Del. 1989).

person who suffers loss of earning power caused by a compensable injury but is not totally disabled can recover the difference between his pre-injury wages and his earning power after the injury.”¹¹ When a party petitions to terminate disability benefits, it does not have to prove that a claimant’s physical condition has changed.¹² Evidence of a loss of earning capacity can be sufficient.

8. Here there was substantial evidence for the Board to decide that Ms. Zaremba’s benefits should be decreased. The unopposed testimony of Dr. Baitch coupled with Ms. Gleckner’s testimony provided sufficient evidence of both a physical and an economic change. Ms. Zaremba offered no substantiated contradictory medical or economic evidence. The Board correctly decided the issue with the information it had before it. It is also clear to the Court that no legal error occurred pursuant to the ruling in *Maxey*, which stated that it was the claimant’s burden to demonstrate any evidence of a wage differential.¹³

9. In light of the foregoing, the decision of the

¹¹ *Jones v. Worthy Brothers, Inc.*, Del. Super., C.A. No. 89A-AP-4, Taylor, J. (Feb. 1, 1990) (ORDER).

¹² See, *Bailey v. State*, 2004 WL 745716 (Del. Super. Ct.), citing, *Brokenbrough v. Chrysler Corporation*, 460 A.2d 551, 553 (Del. Super. 1983).

¹³ *Maxey*, 330 A.2d at 159.

Industrial Accident Board must be, and hereby is, **AFFIRMED**.

_____ **IT IS SO ORDERED.**

TOLIVER, JUDGE